

SOUTH AFRICA / JUDGMENT

Maxiprops 1041 (Pty) Ltd v Gauteng Master Builder Association and Others (22327/2018) [2020] ZAGPPHC 198 (27 May 2020)

[2020] ZAGPPHC 198**COURT**

North Gauteng High Court, Pretoria

BEFORE

Sardiwalla

CASE / FILE NUMBER

22327/2018

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA)****CASE NO: 22327/2018****In****the matter between:**

MAXIPROPS
1041 (PTY) LTD
Applicant
and
GAUTENG
MASTER BUILDER ASSOCIATION
1st Respondent
MASTER
BUILDER ASSOCIATION
2nd
Respondent
MAZEMBE
CONSTRUCTION (PTY) LTD
3rd
Respondent
TW
VAN DEN HEEVER N.O
(Joint
provisional liquidator of
Amber
Falcon 145 (Pty) Ltd)
4th

Respondent
QUINTIN
SIMON JOSEPH N.O
Amber
Falcon 145 (Pty)
Ltd) 5th
Respondent
ASSOCIATION
OF ARCHITECTURAL ALUMINIUM
MANUFACTURES
OF SOUTH AFRICA
6th
Respondent
CONSTRUCTION
PARK BOSY CORPORATE
7th
Respondent
REGISTRAR
OF DEEDS, PRETORIA
8th
Respondent

JUDGMENT

Sardiwalla J:

- [1] In this application the applicant seeks to give effect to the applicant's Right of Extension as defined in the deed of sale between the applicant and the seventh respondent.

BACKGROUND

- [2] The applicant purchased immovable property from the seventh respondent the original owner and developer of the immovable property, which included the right of extension as per the deed of sale and which right also included: the right to erect and complete a further building, a horizontal extension of an existing building and/or a vertical extension to an existing building on that part of the common property situated on the Northern Side of building 2 as indicated on the sectional plan of scheme approved by the Surveyor General under number SG no.: D331/2002 attached to the deed of sale as Annexure A for identification purposes, measuring approximately 648.15 square meters of which 388.43 square meters is common property, for which the right the Purchaser must still apply on behalf of the Seller, at the Purchaser's cost for the issue of a certificate of Real Rights in terms of section 25(6) of the Sectional Titles Act, 1998.
- [3] The real right was not reserved and accordingly the real right still vests in the seventh respondent in terms of section 25(6) of the Sectional Titles Act, 15 of 1986 (hereinafter referred to as the "Act"). In 2017 the applicant decided to enforce its rights in terms of the deed of sale exercising the right to duly extend Building 2. On 25 August 2017 the seventh

respondent informed the members of the seventh respondent that they were required to sign the relevant consent forms in terms of the Sectional Titles Act and the Sectional Titles Scheme Management Act, No. 8 of 2011, which states that members or mortgagees may only withhold their consent on good cause in law.

- [4] On 7 September 2017 the seventh respondent sent a follow up email seeking consent in which it also informed its members that failure to sign the consent forms would result in the applicant approaching the High Court for the necessary declaratory relief. The first to fifth respondents have refused to consent and declined to provide reasons for same. It is on this basis that the applicant approaches this Court to enforce its rights in terms of the Deed of Sale.

THE PARTIES

- [5] The applicant is Maxiprops 1041 (Pty) Ltd, ("Maxiprops") a private company with duly registered in terms of the Company laws of South Africa, it being the owner of immovable property described as Section 2, 3, 4 and 8 and more fully described on Sectional Plan No. SS 703/2002, in the scheme known as Construction Park situated at RANDJESPARK EXTENSION, Johannesburg, held by Certificate of Registered Title ST160069/2002.

- [6] First respondent is the Gauteng Master Builders Association an association incorporated in terms of the Company Laws of South Africa, and is the owner of immovable property described as Section 1 and more fully known as Sectional Plan No. 703/2002 in the scheme known as Construction Park situated at RANDJESPARK EXTENSION, Johannesburg, held by Certificate of Registered Title

ST160069/2002.

- [7] Second respondent is Master Builders South Africa an association incorporated in terms of the Company Laws of South Africa, and is the owner of immovable property described as Section 5 and 10 more fully known as Sectional Plan No. 703/2002 in the scheme known as Construction Park situated at RANDJESPARK EXTENSION, Johannesburg, held by Certificate of Registered Title

ST703-5/2002 and ST703-10/2002 respectively.

- [8] Third respondent is Mazembe Construction (Pty) Ltd a company duly registered and incorporated in terms of the Company Laws of South Africa, and is the owner of immovable property described as Section 7 more fully known as Sectional Plan No. 703/2002 in the scheme known as Construction Park situated at RANDJESPARK EXTENSION, Johannesburg, held by Certificate of Registered Title

ST51376/2011.

- [9] Fourth and Fifth Respondents are joint provisional liquidators of Amber Falcon 146 (Pty) Ltd a company duly registered and incorporated in terms of the Company Laws of South Africa, and is the owner of immovable property described as Section 9 more fully known as Sectional Plan No. 703/2002 in the scheme known as Construction Park situated at RANDJESPARK EXTENSION, Johannesburg, held by Certificate of Registered Title ST56235/2008.
- [10] Sixth Respondent is Association of Architectural Aluminium Manufactures of South Africa an association duly incorporated in terms of the Company Laws of South Africa, and is the owner of immovable property described as Section 6 more fully known as Sectional Plan No. 703/2002 in the scheme known as Construction Park situated at RANDJESPARK EXTENSION, Johannesburg, held by Certificate of Registered Title ST160070/2002.
- [11] Seventh Respondent is Construction Park Body Corporate duly established in terms of Section 36 of the Sectional Titles Act, 95 of 1986, to attend to managing of the sectional title scheme known as Construction Park Office Park established under registration number 703/2002.
- [12] Ninth respondent is the Registrar of Deeds, Pretoria situated at Merina Building, 140 Pretorius Street, Pretoria.

THE RELIEF CLAIMED

- [13] In the notice of motion Maxiprops seeks the following relief:

- “1. That the First to Fifth Respondents be ordered and directed to consent and sign the necessary consent form to issue a Certificate of Real Right by Virtue of Section 25(6) of the Sectional Act, 15 of 1986, read with Section 5(1)(b) of the Sectional Titles Scheme Management Act 8 of 2011 and the alienation, cession and transfer of the right in favour of the Applicant.*
2. That the First to Fifth Respondents be ordered and directed to consent and sign the necessary consent form to issue and registration of a Notarial Cession of Real Right as envisaged in Section (25) (4), 25(6) of the Sectional Act, 15 of 1986, read with Section 5(1)(b) of the Sectional Titles Scheme Management Act 8 of 2011 which includes the alienation, cession and transfer of the right from The Body Corporate of the Sectional Scheme known as Construction Park to Maxiprops 1041 (Pty) Ltd.
3. Failing compliance with any of the above orders by any of the respondents, after a 7day written notice period, the Sheriff of this honourable Court is authorized to rake all the necessary steps in order to effect consent which includes signing the consent forms on behalf of any of the Respondents required to issue and register such certificates.
4. Costs of the application only in the event of any opposition by any of the parties.

5. Ordering and directing the First Respondent, upon receipt of written Further and/ or alternative relief.”

[14] The second respondent is the only party that opposes the application and challenges the applicants’ locus standi to bring this application.

SUMMARY OF THE DISPUTES BETWEEN THE PARTIES

[15] The main issue to be considered is whether Maxiprops as the Purchaser of a Real Right of Extension in the Scheme has locus standi to bring the present application in accordance with the provisions of the Sectional Titles Act and the Management Act as an owner and member of the Body Corporate as defined in the two Acts. At this stage it is necessary to emphasise that the developer ensured that a person/entity only acquires ownership as defined in the relevant two Acts for the real right upon application by the Purchaser on behalf of the Seller, at the Purchaser’s cost, to the Registrar of Deeds for the issue of the Certificate of real rights as contemplated in Section 25(6) of the Sectional Titles Act, 15 of 1986.

THE APPLICANTS’ LOCUS STANDI

[16] As earlier alluded to, the second respondent challenges the applicant’s locus standi to bring this application. The second respondent also raises other defences but it is necessary to first deal or consider the applicant’s locus standi because if I find for the second respondent, it is dispositive of the entire application. It was contended on behalf of the second

respondent that Section 25(6) of the sectional Titles Act creates rights for a body corporate and therefore only the body corporate can enforce these rights against individual members of the body corporate and not the applicant. Further that as the applicant relies on the Deed of Sale for its entitlement to the relief sought and the Deed of Sale makes no provision for the applicant to enforce such rights on behalf of the seventh respondent, the application must be dismissed. Lastly that as the applicant relies on the Deed of Sale for its entitlement to the relief, that the second respondent who was not a party to the agreement should not have been joined in this application.

[17] It was contended on behalf of the applicant that this application was brought to give practical effect to the applicant’s Right of Extension as defined in the Deed of Sale between the applicant and the seventh respondent. The applicant contends that even though the rights to extension vests in the seventh respondent, section 25(6) of the Sectional Titles Act permits the seventh respondent to sell that right and as the applicant purchased that right in terms of the Deed of Sale, such right now vests in the applicant. Further that as the applicant’s rights are clearly being infringed by the first to fifth respondents’ refusal to consent, the former has the standing necessary to seek an order protecting its rights accordingly.

[18] What must be determined in this application is whether or not the applicant, as the owner of the property has the requisite standing to bring the present application in the light of the fact that the section 25 (6) of the Sectional Titles Act refers only to the rights of the body corporate who is in terms of section 41 responsible for the enforcement of the rules and for the control, administration and management of the common property for the benefit of all owners.

[19] Section 25(6) reads as follows:

“(6) If no reservation was made by a developer in terms of subsection (1), or if such a reservation was made and for any reason has lapsed, the right to extend a scheme including land contemplated in section 26, shall vest in the body corporate which shall be entitled, subject to this section and after compliance with the necessary changes, with the requirements of paragraphs (a), (b), (c), (d) and (g) of subsection (2), to obtain a certificate of real right in the prescribed form in respect thereof: Provided that the body corporate shall only exercise or alienate or transfer such right with the written consent of all the members of the body corporate as well as with the written consent of the mortgagee of each unit in the scheme: Provided further that a member or mortgagee shall not withhold such approval without good cause in law.”

[20] The applicant confirmed in its founding affidavit[1] that the real right was not reserved and accordingly such right still vests in the seventh respondent in terms of section 25(6) above of the Act. Therefore, by ordinary interpretation the seventh respondent as the body corporate can only exercise or alienate or transfer its right upon obtaining written consent of all of the members of the body corporate. This provision deals specifically with the consequences of the real right when it has failed to be reserved or such right has lapsed. Therefore I must disagree with the applicant's interpretation that section 25(6) of the Act provides an express prerogative to a body corporate to sell the real right in a Deed of Sale as the applicant suggests in its heads of argument[2]. In terms of section 25(6) of the Act, the real right by virtue of the applicant's failure to apply for a Certificate of Real Rights with the Registrar of the Deeds office as agreed in the Deed of sale, caused the right to lapse and such right is now vested in the seventh respondent. The provision then makes it clear that once the right reverts to the seventh respondent it has the prerogative to exercise or alienate or transfer the real right such exercise subject to the written consent of all of its members.

[21] The first to fifth respondents' refusal to provide consent and then raises the question of whether such refusal permits the applicant as owner to bring the present application. I can find no such indication as the section is clear that the right is vested in the seventh respondent and therefore must be interpreted to mean that such right places a statutory responsibility on the seventh respondent's to enforce the provision of section 25(6) of the Act in terms of the necessary consent and to ensure that its members comply with its rules. The seventh respondent in this case had initiated the necessary steps to comply with the provision by communicating to the other members that their consent was required.

[22] Before an owner can have the necessary locus standi to approach the Court for relief it must comply with Section 41 of the Act which provides the owner with an internal remedy to resolve the dispute. This section confirms the body corporate mandate and sets out the requirements which an aggrieved owner must exhaust. Section 41 of the Sectional Titles Act which provides that:

"41 Proceedings on behalf of bodies corporate.- (1) When an owner is of the opinion that he and the body corporate have suffered damages or loss or have been deprived of any benefit in respect of a matter mentioned in section 36 (6), and the body corporate has not instituted proceedings for the recovery of such damages, loss or benefit, or where the body corporate does not take steps against an owner who does not comply with the rules, the owner may initiate proceedings on behalf of the body corporate in the manner prescribed in this section.

- (2) (a) Any such owner shall serve a written notice on the body corporate calling on the body corporate to institute such proceedings within one month from the date of service of the notice, and stating that if the body corporate fails to do so, an application to the Court under paragraph (b) will be made.
- (b) If the body corporate fails to institute such proceedings within the said period of one month, the owner may make application to the Court for an order appointing a curator ad litem for the body corporate for the purposes of instituting and conducting proceedings on behalf of the body corporate.
- (3) The court may on such application, if it is satisfied –
 - (a) that the body corporate has not instituted such proceedings;
 - (b) that there are prima facie grounds for such proceedings; and
 - (c) that an investigation into such grounds and into the desirability of the institution of such proceedings is justified, appoint a provisional curator ad litem and direct him to conduct such investigation and to report to the Court on the return day of the provisional order.
- (4) The Court may on the return day discharge the provisional order referred to in subsection (3), or confirm the appointment of the curator ad litem for the body corporate, and issue such directions as it may deem necessary as to the institution of proceedings in the name of the body corporate and the conduct of such proceedings on behalf of the body corporate by the curator ad litem."

[23] It is significant to note that the Sectional Titles Act 95 was partially repealed by the Sectional Titles Schemes Management Act, 8 of 2011 ("Sectional Titles Schemes Management Act"), section 4(i) of the latter Act contains a provision similar to that of s 38 (j) of the former Act. Section 4 (i) of the Management Act empowers the body corporate to do all things reasonably necessary for the enforcement of rules and for the management and administration of the common property. Section 9 of the Sectional Schemes Management Act reads as follows:

“Proceedings on behalf of body corporate.”

- (1) An owner may initiate proceedings on behalf of the body corporate in the manner prescribed in this section:
 - (a) when such owner is of the opinion that he or she and the body corporate have suffered damages or loss or have been deprived of any benefit in respect of a matter mentioned in section 2 (7), and the body corporate has not instituted proceedings for the recovery of such damages, loss or benefit; or
 - (b) when the body corporate does not take steps against an owner who does not comply with the rules.
- (2)
 - (a) Any such owner must serve a written notice on the body corporate calling on the body corporate to institute such proceedings within one month from the date of service of the notice, and stating that if the body corporate fails to do so, an application to the Court under paragraph (b) will be made;
 - (b) If the body corporate fails to institute proceedings within the period referred to in paragraph (a), the owner may make application to the Court for an order appointing a curator ad litem for the body corporate for the purpose of instituting and conducting proceedings on behalf of the body corporate.
- (3) The Court may on such application, if it is satisfied
 - (a) that the body corporate has not instituted such proceedings;
 - (b) that there are prima facie grounds for such proceedings; and
 - (c) that an investigation into such grounds and into the desirability of the institution of such proceedings is justified, appoint a provisional curator ad litem and direct him or her to conduct an investigation into the matter and to report to the Court on the return day of the provisional order.
- (4) The Court may on the return day discharge the provisional order referred to in subsection (3), or confirm the appointment of the curator ad litem for the body corporate, and issue such directions as it may consider necessary to the institution of proceedings in the name of the body corporate and the conduct of such proceedings on behalf of the body corporate by the curator ad litem.
- (5) A provisional curator ad litem appointed by the Court under subsection (3) or a curator ad litem whose appointment is confirmed by the Court under subsection (4), has such powers as may be prescribed, in addition to the powers expressly granted by the Court in connection with the investigation, proceedings and enforcement of a judgment.

- (6) If the disclosure of any information about the affairs of a body corporate to a provisional curator ad litem or a curator ad litem would in the opinion of the body corporate be harmful to the interests of the body corporate, the Court may on an application for relief by that body corporate, and if it is satisfied that the said information is not relevant to the investigation, grant such

relief.

- (7) The Court may, if it appears that there is reason to believe that an applicant in respect of an application under subsection (2) will be unable to pay the costs of the respondent body corporate if successful in its opposition, require sufficient security to be given for those costs and the costs of the provisional curator ad litem before a provisional order is made.”

- [24] Judicial interpretation of sections 41 of the Sectional Titles Act must therefore apply to section 9 of the Management Act as was held by the court in *Cassim v Voyager Property Management (Pty) Ltd* (574/10) [2011] ZASCA 143 (23 September 2011) at paragraph 11:

“The jurisdictional facts provided for in s 41(1) are that an owner be of the opinion that he, she or it and the body corporate ‘have

been deprived of any benefit in respect of a matter mentioned in s 36(6)’. Section 36(6) provides:

' The body corporate shall have perpetual succession and shall be capable of suing and of being sued in its corporate name in respect of -

- (a) any contract made by it;
- (b) any damage to the common property;
- (c) any matter in connection with the land or building for which the body corporate is liable or for which the owners are jointly liable;
- (d) any matter arising out of the exercise of any of its powers or the performance or non-performance of any of its duties under this Act or any rule; . . . '

- [25] The issue of locus standi of owners of sectional scheme property was considered in *Cassim and Another v St Moritz Body Corporate and Others* (16788/2004, 18425/2004, 2918/2005, 11914/2005) [2010] ZAKZDHC 19 (11 June 2010).

- [26] The First and Second Plaintiffs purchased three sectional title units in St Moritz. Later, the plaintiffs became concerned over what they perceived as mismanagement of the building. The plaintiff instituted court applications as trustees of the body corporate. The Second Defendant, Voyager Property Management, denied that the plaintiffs had locus standi to bring the proceedings as they could no longer rely on the locus standi they had as trustees because the entire board of trustees had been suspended. The Third and Fourth Defendants also raised a special plea stating that the plaintiff cite themselves in their personal capacities in the numerous applications and actions. That being the case, the plaintiffs were bound to take action against the Defendants in terms of the Sectional Title Act No 95 of 1986 but failed

to do so.

- [27] The Court relied on the decision in *Letseng Diamonds Ltd v JCI Ltd* 2009 (4) SA 58 (SCA) at 59 in which it was held that an individual shareholder in the company has locus standi to approach the Court for a determination of issues relating to the validity of the Agreement.
- [28] The plaintiff argued that as an individual member of the body Corporate, owner and trustee, she is entitled to have the validity of the Loan determined, as it affects her rights of ownership in that the creditor is entitled to recover from her, any shortfall which it could not recover from the Body Corporate. It was however, argued on behalf of the Second Defendant that the Plaintiffs had adequate remedies under the Sectional Titles Act in that section 41 which provided a comprehensive statutory right for an owner of a sectional title unit to seek the appointment of a curator ad litem to bring proceedings in the name of the body corporate, where the body corporate has not instituted proceedings for the recovery of damages or loss or where it had been deprived of any benefit in respect of a matter mentioned in section 36 (6) of the Act. Counsel for the Second Defendant relied on this contention on *Wimbledon Lodge (Pty) Ltd v Gore NO & Others* 2003 (5) SA 315 (SCA) where the court found as follows:

"I am satisfied that section 41 of the Sectional Titles Act protects an aggrieved owner "and the body corporate who have suffered damages or loss or have been deprived of any benefit in respect of a matter mentioned in section 36(6) and where the body corporate has not instituted proceedings for the recovery of such damages, loss or benefit", by providing for the appointment of a curator-ad-litem at the request of an aggrieved owner, provided the court is satisfied that the requirements of section 41(3) have been met."

- [29] The plaintiffs who were dissatisfied with the finding that they had no locus standi appealed to the Supreme Court of Appeal. In *Cassim v Voyager*, supra, the court explained the operation of section 41 as follows:

"[13] . . . it appears to me that the section finds application precisely when there is disharmony and disunity in the body corporate. The more dysfunctional the body corporate, the greater, I dare say, the need for a curator. On the view that I take of the matter, the argument advanced by and on behalf of the appellants misconstrues the section. The section does not require an owner to cause the body corporate to act in a particular way if the latter is unwilling to do so. All that is envisaged is for an owner to effect service of a notice on the body corporate calling upon it within the stated period to institute the contemplated proceedings. Should it fail to do so the envisaged remedy available to the owner is not to compel compliance with the notice but rather to approach the court for the appointment of a curator ad litem for the purposes of instituting and conducting the proceedings on behalf of the body corporate."

- [30] The court went on to explain further that it is only the body corporate and not individual members who may institute proceedings against wrongdoers;

“[15] The last string to counsel’s bow on this aspect of the case was the following statement from Wimbledon Lodge (para 14): ‘If the body corporate is seen not to do its duty, then an individual’s powers may, to an extent, be restored’. Plainly what Schutz JA intended to convey was this: an individual’s powers may to the extent provided for in s 41 be restored. Indeed, as Schutz JA pointed out (para 18), that accords with the general principle at common law that where a wrong is done to it, only the company (in this case the body corporate) and not the individual members may take proceedings against the wrongdoers (Foss v Harbottle [1843] EngR 478; (1843) 2 Hare 461 (67 ER 189)). Schutz JA’s statement thus affords no authority for the proposition that owners who find themselves in the position of the present appellants are exempt from the provisions of s 41. The conclusion that I therefore reach is that s 41 finds application to the appellants.”

In upholding the decision of the trial judge, the court further said that:

“[19] The real difficulty for the appellants in this case, however, is that they did not impugn the constitutionality of s 41 or any other provision of the Act. Accordingly, to borrow from Mokgoro J in Du Toit v Minister of Transport 2006

- (1) SA 297 (CC) para 29: ‘in these circumstances, and in the circumstances of this case, the Act cannot be bypassed’. Section 41 read with s 36(6) plainly encompassed within its scope the three claims in respect of which the appellants came to be non-suited by Van den Reyden J. It follows that the conclusion of the learned judge cannot be faulted and in the result the appeal must fail.”
- [31] The law is clear from the above judgments that the applicant ought to have served the seventh respondent with a notice in terms of section 41 and cannot be exempt from same by invoking claiming entitlement of rights as a party to the Deed of Sale. In short, the applicant did not have the requisite locus standi to bring the application because section 38(j) of the Act empowers the Body Corporate to do all things reasonably and necessary for the enforcement of the rules and for the control, management and administration of the common property.
- [32] Accordingly the applicant, has failed to comply with the above provisions, attempts to avoid the apparent failure by stating that it is entitled to the relief by virtue of the Deed of Sale because the real right is vested in the applicant. It cannot be denied that there is disharmony and disunity in the body corporate; however the applicant has never argued that it instituted these proceedings on behalf of the body corporate. It follows that the applicant lacks locus standi in the present proceedings.

[33] In the result, I make the following order:

1. The application is dismissed with costs.

SARDIWALLA J

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant:

Adv P.J Kok

Instructed by:

Carel Van Der Merwe Attorneys

For the Second Respondents:

Adv.:C J Welgemoed

Instructed by:

Kunene Ramapala Inc

Date of Hearing

: 06 November 2019

Date of Reasons

: 27 May 2020

[1] [1] Founding affidavit page 9, Index, Volume 1 page 16

[2] Applicant's Heads of Argument, paragraph 3.3 to 3.5

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Prepared on 11 October 2026 · Esheria